(1)

Supreme Court, U.S.
FILED

02 426 SEP 11 2001

No. _____

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

DAVID G. NIXON
Counsel of Record

THE NIXON LAW FIRM
2340 GREEN ACRES RD.
SUITE 12
FAYETTEVILLE, AR 72703
TEL: (479) 582-0020

Counsel for Petitioners

RICHARD A. FISHER
Counsel of Record

THE FISHER LAW FIRM
1510 STUART ROAD
SUITE 210
CLEVELAND, TN 37364
TEL: (423) 479-7009

Counsel for Petitioners

24PP

QUESTIONS PRESENTED

Whether class member objectors who were denied intervention may appeal an order requiring them to post a supersedeas bond.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Teresa Ballard, Kenisha Bryant, and Cheryl King, individual citizens of the United States. Ms. Ballard and Ms. King reside in the State of Arkansas and Ms. Bryant resided there at the time this litigation commenced. The Petitioners have no corporate affiliations. The Petitioners were objecting class members in the Circuit Court of Clark County, Arkansas and the Appellants before the Arkansas Supreme Court.

Respondents

Phyllis Garrett is an individual citizen of the United States, residing in the State of Arkansas. Ms. Garrett was the designated class representative in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") is an Arkansas corporation. Advance America was the defendant in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent of this Court. 7

A. *Devlin v. Scardelletti* Applies to Classes Containing Opt-Out Provisions. 8

B. *Devlin v. Scardelletti* Applies to State Court Proceedings. 9

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants. 10

III. The Appellate Rule of the Arkansas Supreme Court Denies Due Process to the Petitioners and to All Other Similarly Situated Litigants. 13

IV. The Question Presented is Important. 14

CONCLUSION 15

APPENDIX A 1a

APPENDIX B 8a

APPENDIX C 10a

APPENDIX D 15a

APPENDIX E 17a

APPENDIX F 18a

APPENDIX G 26a

APPENDIX H 34a

TABLE OF AUTHORITIES

Federal Cases

Boddie v. Connecticut, 401 U.S. 371, 376, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971) 14

Devlin v. Scardelletti, 536 U.S. ---, 122 S.Ct. 2005, 153 L.Ed.2d 27 (June 10, 2002) ..... passim

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963) 10, 13

Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741 (1940) 9, 10, 13

Henderson v. General American Life Ins. Co., 122 S.Ct. 2584 (June 17, 2002) 9

Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L.Ed.2d 36 (1972) 4, 12

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993) 10

Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) 10, 13

Richardson v. Ramirez, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974) 10, 13

State of Minnesota v. National Tea Company, 309 U.S. 551, 557, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940) 14

State Cases

Arkansas State Highway Commission v. Perrin, 240 Ark. 302, 305, 399 S.W.2d 287, 289-90 (1996) 11

Ballard, et al. v. Advance America, ___, Ark. ___ S.W. 3d ___ (July 5, 2002) 5

Dootson v. State, 2000 WL 1745267 (Ark. App. 2000) 12

Haberman v. Lisle, 318 Ark. 177, 884 S.W.2d 262 (1994) 5, 6, 9, 11

Hodges v. Gray, 321 Ark. 7, 901 S.W.2d 1 (1995) 11

In re $ 3,166,199 11

In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990) 11

McCoy v. Moore, 338 Ark. 740, 741, 1 S.W.3d 11, 12 (1999) 12

Ouachita Baptist College v. Scott, 64 Ark. 349, 42 S.W. 536 (1897) 11

Federal Statutes

28 U.S.C. § 1257(a) 1

U. S. Const., Amend. XIV ..... passim

State Statutes

A.C.A. § 16-11-302 ..... 1, 12

A.C.A. § 16-65-119 ..... 2, 12

Federal Rules

Fed. R. Civ. P. 23 9

State Rules

Ark. R. App. P.-Civil 2 ..... 2, 12

Ark. R. Civ. P. 23 9

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The original opinion of the Arkansas Supreme Court (App. A at 1a) is reported at 348 Ark. 567, 74 S.W.3d 608. The opinion of the Arkansas Supreme Court denying the Petitioners' Petition for Rehearing (App. D at 15a) is not reported. The opinion denying the Petitioners' Motion to Amend Petition for Rehearing (App. E at 17a) was reported at 349 Ark. 726, 80 S.W. 3d 374. The opinion of the Arkansas Supreme Court upon which it relied in denying the Petitioners' Motion to Amend Petition for Rehearing (App. C at 10a) is reported at 349 Ark. 545, 79 S.W. 3d 608. The opinion of the Circuit Court of Clark County, Arkansas ordering the Petitioners to post a supersedeas bond in the amount of $ 750,000.00 (App. B at 8a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered May 9, 2002. The Arkansas Supreme Court entered its order denying the Petitioners' timely Petition for Rehearing *per curiam* on June 13, 2002.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. U. S. Const., Amend. XIV. (App. F at 18a.)

2. A.C.A. § 16-11-302. (App. F at 20a.)

3. A.C.A. § 16-65-119. (App. F at 22a.)

4. Ark. R. App. P.-Civil 2. (App. F at 22a.)

STATEMENT OF THE CASE

This appeal arises from an order of the Circuit Court for Clark County, Arkansas, the Hon. John A. Thomas, ordering the Petitioners to post a $ 750,000.00 supersedeas bond pending their appeal of his approval, over their objection, of a proposed class action settlement agreement. (App. B at 8a.)

The case began on October 12, 1999 as a suit by Ms. Garrett against Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America"). The case was certified as a class action, simultaneous notice of certification and settlement was given, and the Petitioners sought to intervene, which was denied. The Petitioners timely objected to the proposed settlement agreement as being inadequate, unreasonable, and unjust. Over the Petitioners' objection, the trial court approved the class action settlement agreement. The Petitioners appealed the trial court orders denying intervention and approving the settlement agreement.

Ms. Garrett then sought to require the Petitioners to post a supersedeas bond and to give notice of the appeal to the Class Members. The Petitioners did not request a stay of the trial court's order approving the class action settlement agreement pending their appeal. The stay was desired by the Advance America and Ms. Garrett has taken no action to secure the performance of Advance America under the settlement agreement.

After a hearing on September 5, 2001, the trial court ordered the Petitioners to post a supersedeas bond in the amount of $ 750,000.00. Due to the Petitioners' poor

financial condition, as evidenced by their previous payday loan transactions with Advance America and their affidavits filed in the trial court, they were unable to comply with that order. Ms. Garrett has sought to hold the Petitioners in contempt of court on at least two occasions for failing to file the supersedeas bond as ordered.[1]

On September 20, 2001, the Petitioners appealed the trial court's order requiring them to post a supersedeas bond. On May 9, 2002, the Arkansas Supreme Court dismissed the Petitioners' appeal of that order on the grounds that they had not yet been granted leave to intervene, were therefore not yet parties, and hence had no standing as objecting class members to appeal from that order.

On May 29, 2002, the Petitioners filed their Petition for Rehearing with the Arkansas Supreme Court. At that time, the Petitioners raised the federal constitutional issues of denial of due process and equal protection.

> As objectors only, if it is true that they have no standing to appeal from the Trial Court's order directing them to file a supersedeas bond, it follows that the Trial Court did not have the jurisdiction over them to order them to post the bond in the first place. [FN omitted.] To hold otherwise would deprive the Appellants of property and, potentially, liberty (if the Appellees' attempted contempt sanctions are imposed) without due process of law. In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990).

Brief in Support of Petition for Rehearing. (App. G. at 29a-30a.)

---

[1] Petitioners filed a Petition for Writ of Prohibition or Certiorari with the Arkansas Supreme Court on the issues of the bond and the threatened contempt, which was denied on December 13, 2001.

> If the Trial Court had the requisite jurisdiction to order the Appellants to post the supersedeas bond and they are not allowed to appeal from that order, they are being denied equal protection under the Fourteenth Amendment to the United States Constitution. Once the State of Arkansas established an appellate procedure for non-parties who have been affected by an order of a trial court, denial of a right to appeal to one class of aggrieved parties violates their right to equal protection under the laws. *See, Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L.Ed.2d 36 (1972).

Brief in Support of Petition for Rehearing. (App. G. at 32a.)

On June 12, 2002, the Petitioners filed their Motion to Amend Appellants' Petition for Rehearing (App. H at 34a) to bring to the Arkansas Supreme Court's attention this Court's decision in *Devlin v. Scardelletti*, 536 U.S. ---, 122 S.Ct. 2005, 153 L.Ed.2d 27 (June 10, 2002). On June 13, 2002, the Arkansas Supreme Court denied the Petitioners' Petition for Rehearing. (App. D at 15a.)

On June 20, 2002, the Arkansas Supreme Court then upheld the trial court's order denying the Petitioners' intervention on the grounds that their Motion to Intervene was untimely and on July 5, 2002 dismissed their appeal of the order approving the settlement agreement on the grounds that they had no standing to appeal since they were not parties to the underlying proceedings. On July 5, 2002, the Arkansas Supreme Court also denied the Petitioners' Motion to Amend Appellants' Petition for Rehearing (App. E at 17a), citing its dismissal of their settlement agreement appeal. (App. C at 10a.)

> **Per Curiam.** The Motion to Amend Appellants' Petition for Rehearing is denied pursuant to the recent decision of this court in *Ballard, et al. v. Advance*

America, ___, Ark. ___ S.W. 3d ___ (July 5, 2002), Supreme Court case number 01-1190.

Opinion of the Supreme Court of Arkansas. (App. E at 17a.)

> However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.
>
> Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra.* Non-parties and unnamed members of the class who have failed to intervene are

precluded from appealing a class settlement. *Haberman, supra.*

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman.*

Unlike the petitioner in *Devlin,* appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman,* appellants have no standing; thus the appeal is dismissed.

Opinion of the Supreme Court of Arkansas. (App. C at 12a-14a.)

The Petitioners asked the Arkansas Supreme Court to reconsider its dismissal of their appeal of the trial court's order approving the settlement and that Petition for Rehearing was denied on September 5, 2002.[2]

REASONS FOR GRANTING THE PETITION

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent of this Court.

The Arkansas Supreme Court unequivocally held that unnamed class members who have not successfully intervened are without standing to appeal a trial court order requiring them to post a supersedeas bond. The Arkansas Supreme Court said:

> In looking at the merits of this issue, we determine that appellants do not have standing to appeal this issue because they are not parties who may take independent action in the underlying class action. Rather, they are class-member objectors at this juncture. Their motion to intervene was denied by the trial court, and unless this court reverses that order in that upcoming appeal, Appellants will not be independent parties to this class action. (emphasis added) (App. A at 5a.)

On June 10, 2002, this Court decided *Devlin v. Scardelletti*, 536 U.S. —, 122 S.Ct. 2005, 153 L.Ed.2d 27 (June 10, 2002). That case held, *inter alia*, that an unnamed class member who timely objects to the terms of a class action settlement has standing to appeal and is a "party" who may appeal. This Court's decision in *Devlin* was timely brought to the attention of the Arkansas Supreme Court by the Petitioners

---

[2] A Petition for Certiorari to the Arkansas Supreme Court in that related case is anticipated.

(App. H at 34a) and the issues it raised were considered and ruled upon by that court. (App. E at 17a; App. C at 10a.)

The decision of the Arkansas Supreme Court in this case specifically and categorically rejects *Devlin, id.* As a result, it creates in Arkansas a standard for objecting class members that is not only inconsistent with *Devlin*, but (for the reasons set forth there) denies them due process and equal protection afforded under the Fourteenth Amendment to the United States Constitution.

A. *Devlin v. Scardelletti* Applies to Classes Containing Opt-Out Provisions.

One reason given by the Arkansas Supreme Court for distinguishing this case from *Devlin* is that it involved a non-opt-out class while the class in the instant case contained an opt-out provision. (App. C at 13a.) In explicitly rejecting *Devlin*, the Arkansas Supreme Court said:

> ... the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections. (App. C at 13a.)
>
> * * *
>
> Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their

> motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman*, appellants have no standing; thus the appeal is dismissed. (App. C at 13a-14a.)

This Court implicitly held on June 17, 2002 that the presence of an opt-out provision was a distinction without a difference in applying the ruling of *Devlin*. See, *Henderson v. General American Life Ins. Co.*, 122 S.Ct. 2584 (June 17, 2002). This result makes sense because a class member's standing arises from the due process considerations that permit a representative to adjudicate the class member's rights in the first place, not as a result of whether there is an opt out provision. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741 (1940). Accordingly, the Arkansas Supreme Court's rationale on this point must be rejected.

B. *Devlin v. Scardelletti* Applies to State Court Proceedings.

The other reason given by the Arkansas Supreme Court for distinguishing and rejecting *Devlin* is that *Devlin* dealt with issues arising under Fed. R. Civ. P. 23 while the instant case arose under Ark. R. Civ. P. 23.

> However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure.

Opinion of Arkansas Supreme Court. (App. C at 12a-13a.)

That justification must also be rejected here. In the first place, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra.* That would presumably encompass both the due process and equal protection guarantees arising under the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issues of due process and equal protection were timely raised by the Petitioners and were ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

In the second place, the Petitioners submit that the issue of one's standing to appeal a decision arising out of a state class action proceeding is not, strictly speaking, a Rule 23 procedural issue... It is an issue involving the substantive principles of due process and equal protection. Due process is involved since unnamed class members are entitled to those protections before their rights may be affected in the proceeding and equal protection to the extent they are denied the right to appeal otherwise afforded to similarly situated litigants.

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants.

Petitioners have standing to petition this Court for equal protection. See, e.g., *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993). Even though the Petitioners have a direct interest in the outcome of this litigation, the Arkansas appellate rule

in question will also affect all future objecting class members in the State and will deny them equal protection on two fronts: (1) Given their standing as unnamed, objecting class members, they will be denied appellate review that is being otherwise afforded to named parties in class action proceedings; and (2) As persons whose pecuniary interests are affected by the supersedeas order, they will be denied appellate review that is being otherwise afforded to similarly situated persons.

Named parties to a class action proceeding in Arkansas or intervenors therein are afforded access to that State's appellate courts. See, e.g., *Haberman v. Lisle*, 318 Ark. 177 884 S.W.2d 262 (1994). The Petitioners have been denied appellate review solely because they are non-intervening unnamed class members.

In the broader context of non-class action proceedings, the Arkansas Supreme Court (similarly to this Court's reasoning in *Devlin*) has long recognized the right of unnamed parties to appeal where their pecuniary interests are affected by an order of a lower court. See, e.g., *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S.W. 536 (1897); *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990) (trial court's order directing witness to pay $ 10,000 toward care of ward exceeded its jurisdiction); *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995) (attorney for party permitted to appeal criminal contempt citation against him); *Arkansas State Highway Commission v. Perrin*, 240 Ark. 302, 305, 399 S.W.2d 287, 289-90 (1996) ("No one is aggrieved except the [Highway] commission, and, whether technically a party or not in the County court, appellant certainly is the one affected by the court order. This court has long recognized the right of who feels aggrieved by an order of a court, to appeal to a higher tribunal."); *In re $ 3,166,199*, 337 Ark. 74, 79, 987 S.W.2d 663, 666 (1999) (appeal of Arkansas Highway Patrol allowed to claim portion of res in proceeding to which it was not a named party); *McCoy v. Moore*, 338 Ark. 740, 741,

1 S.W.3d 11, 12 (1999) (appeal dismissed because not timely filed); *Dootson v. State*, 2000 WL 1745267 (Ark. App. 2000) (witness cited for contempt allowed to appeal).

This result is consistent with the laws of Arkansas dealing with the right of appeal. For example, Ark. R. App. P.-Civil 2 does not limit the right of an appeal to a "party." See also, A.C.A. §§ 16-11-302 and 16-65-119.

When the trial court imposed the obligation on the Petitioners to file a $ 750,000.00 supersedeas bond, even though they had not requested a stay pending their appeal of the class action settlement, it implicated their pecuniary interests and exposed them to the contempt powers of that court.[3]

This Court has stated:

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois, supra; Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 788, 9 L.Ed.2d 892 (1963); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). Cf. *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958).

Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 876 (1972).

---

[3] Ms. Garrett has attempted on two separate occasions to impose contempt sanctions on the Petitioners in spite of their inability to raise the approximately $ 820,000.00 necessary for them to comply with the trial court's order.

The Petitioners are arbitrarily being denied the right to appeal otherwise afforded named class action parties and afforded persons whose pecuniary interests are affected solely because of their status as non-intervening objecting class members. This misguided rule appears to be a relic of the pre-*Devlin* confusion between the Circuit Courts of Appeal on this issue that just refuses to pass. No good reason for this disparity is evident or can withstand examination under the Fourteenth Amendment's gaze.

III. The Appellate Rule of the Arkansas Supreme Court Denies Due Process to the Petitioners and to All Other Similarly Situated Litigants.

If Petitioners are "parties" sufficiently to permit the trial court to enter a supersedeas order against them, they ought to be entitled to due process.

As state above, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra* ("In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit."); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issue of due process was timely raised by the Petitioners and was ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). This Court has previously stated:

> Thus, this Court has seldom been asked to view access to the courts as an element of due process. The

> legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." (emphasis added.)

Boddie v. Connecticut, 401 U.S. 371, 376, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971).

The Petitioners were given notice of Ms. Garrett's motion to seek an order from the trial court requiring them to post a supersedeas bond, timely objected and were ordered to post a $ 750,000.00 bond. Nevertheless, they have been denied the right to be heard on appellate review of that decision.

In essence, they are being denied due process because the Arkansas rules of standing are being used to subject them to obligations in its judicial system, while denying them access to the appellate courts.

IV. The Question Presented is Important.

This Court has stated that it, and not the state courts, is to be the final arbiter of federal constitutional questions and may make such disposition of the case as justice requires. *State of Minnesota v. National Tea Company*, 309 U.S. 551, 557, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940).

The rule adopted by the Arkansas Supreme Court as to non-intervening objecting class members eliminates their

access to the appellate courts of the State for all purposes and will affect their rights in all future class litigation. The fact that the Arkansas Supreme Court's opinions dismissing the Petitioners' appeals of the settlement agreement and the supersedeas bond have been designated for publication demonstrates that court's intention to apply those decisions in future class action litigation.

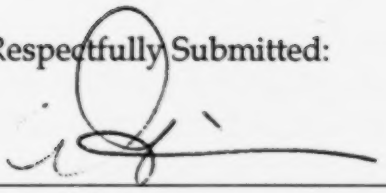
Objecting class members or class members subjected to other orders of the trial court cannot predict with any certainty whether they will be allowed to intervene and yet will continue to be subject to orders affecting their property or liberty interests. If intervention is allowed to remain as the key to the Arkansas Supreme Court's chambers, these persons' due process and equal protection rights will be granted or denied in the discretion of the trial court. These rights should be absolute and assured to all who are affected by those proceedings.

CONCLUSION

If the Petitioners, who timely objected to the proposed settlement and appealed from the order approving it, have enough standing for due process to permit a trial court to order them to post a $ 750,000.00 supersedeas bond, it is a denial of due process to deny them an opportunity to be heard on appeal. Moreover, since the courts of Arkansas permit appeals by named class members and defendants in class actions and by others whose pecuniary and liberty interests are implicated by a trial court's order, the Petitioners and all future objecting class members are being denied equal protection under the law if they are arbitrarily denied the same rights of appeal.

The Petitioners respectfully request this Court to enter its order reversing and remanding these proceedings to the Arkansas Supreme Court for proceedings in conformity with this Court's ruling.

Respectfully Submitted:



David G. Nixon
THE NIXON LAW FIRM
2340 Green Acres Road, Ste 12
Fayetteville, AR 72703
Tel: 479-582-0020
Fax: 479-582-0030

Richard A. Fisher, Esq.
THE FISHER LAW FIRM
1510 Stuart Road, Ste 210
Cleveland, TN 37364-0191
Tel: 423-479-7009

Attorneys for Petitioners
Teresa Ballard, Kenisha Bryant,
and Cheryl King

s:\check cashing cases\state actions\garrett v. advance america, no. ca 01-1182 (appeal-bond)\certiorari, petition-dgn.doc

APPENDIX

The Appendix is in a separate volume submitted herewith.